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No. 06-147

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AT HOME CORPORATION,
Petitioner,

v.

COX COMMUNICATIONS, INC., COX @HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATIONS, INC., COMCAST PC INVESTMENTS, INC., BRIAN L. ROBERTS, AND DAVID M. WOODROW,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION ON BEHALF OF THE COMCAST RESPONDENTS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. With respect to a hybrid derivative security (*i.e.*, one permitting exercise at either a fixed or a floating exercise price depending upon the market price of the underlying equity security at the time of exercise), whether the courts below properly ruled that the acquisition of the instrument constitutes a Section 16(b) transaction in the underlying security pursuant to 17 C.F.R. § 240.16b-6(a), and that the eventual exercise of the instrument pursuant to its fixed-price component is a non-event for Section 16(b) purposes by operation of 17 C.F.R. § 240.16b-6(b).

2. Whether the lower courts properly ruled that Comcast's acquisitions of the shares of three cable companies are not equivalent to Section 16(b) purchases of At Home warrants held by those companies in their investment portfolios that can be matched to Comcast's deemed sale of At Home stock.

CORPORATE DISCLOSURE STATEMENT

No publicly-held corporation owns 10% or more of the stock of Comcast Corporation. Comcast Online Communications, Inc. and Comcast PC Investments, Inc. certify that Comcast Corporation is their corporate parent and that no publicly-held corporation other than Comcast Corporation owns 10% or more of their stock.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION ON BEHALF OF THE COMCAST RESPONDENTS

In their petition for a writ of certiorari, petitioners, representing former bondholders of the defunct At Home Corporation (the "Bondholders"), challenge the dismissal of two, alternative claims under Section 16(b) of the Securities Exchange Act of 1934 (relating to "short swing" profits on purchases and sales of securities by an issuer's insiders, all as defined). Each of these claims arises from the acquisition and exercise of a hybrid derivative security[1] (the "Put Option")

[1] A "hybrid" derivative is a right to buy or sell a security that contains both fixed and floating price components and is exercisable at one or the other depending upon the terms of the instrument and the market price of

which gave Comcast[2] the right to sell its At Home common stock to AT&T Corp. at the greater of $48 per share or the applicable thirty trading-day average market price of At Home stock. For their first claim, the Bondholders challenge the lower courts' determination that Comcast's acquisition of the Put Option was equivalent to a sale of the underlying At Home securities by virtue of Securities and Exchange Commission ("SEC") Rule 16b-6(a), and that Comcast's subsequent exercise of the Put Option at its fixed price component was an exempt event under Rule 16b-6(b). For their second claim, the Bondholders argue that the lower courts improperly ruled that Comcast's deemed sale of *At Home* stock could not be matched to Comcast's purchases of the stock of *three other cable companies* whose securities portfolios happened to contain, among other things, At Home warrants.

The Bondholders have failed to identify any reason for granting certiorari in this case. There is no split of authority among the circuit courts: the Second Circuit is the only court of appeals to have applied Section 16(b) in the context of hybrid derivative securities. No aspect of the Second Circuit's decision touches upon any important federal question that conflicts with relevant Supreme Court authority. With respect to Count I of the Complaint, the Bondholders continuously maintained throughout this litigation that the Put Option was different from "any instrument in any other reported case" and that the analytical approach adopted in

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the security. *See* Petitioner's App. A (Second Circuit opinion) at 4a ("The Letter Agreement grants a 'hybrid option' because the pricing formula has both fixed and floating components."); Petitioner's App. B (district court decision) at 23a ("The question presented . . . is how to apply § 16(b) to options containing both a fixed and a floating component ('hybrids').").

[2] Respondents Comcast Corporation, Comcast Online Communications, Inc., and Comcast PC Investments, Inc. are collectively referred to herein as "Comcast."

those cases "simply does not 'work' when applied to the unique instrument at issue here." Appellant's Br. at 24, 37. This Court has also previously denied certiorari with respect to the very issue asserted in Count II, letting stand the Second Circuit's determination that Section 16(b) applies only to single-issuer transactions. *See American Standard Co. v. Crane Co.*, 510 F.2d 1043 (2d Cir. 1974), *cert den'd*, 421 U.S. 1000 (1975). Indeed, though the Bondholders fail to mention the fact in their petition, the Second Circuit issued its decision after requesting an amicus brief from the SEC that also concluded that these claims should be dismissed. In truth, the only reason for this petition is that it represents the Bondholders' last chance at obtaining a windfall recovery based on two novel theories of short-swing liability that have been reviewed and rejected by the courts below and the SEC as contrary to both the letter and the spirit of Section 16(b). For these and the reasons discussed below, the Bondholders' petition should be denied.

STATEMENT OF THE CASE

A. The Complaint And The District Court's Decision

In Count I of their Complaint, the Bondholders alleged that Comcast's purported exercise of the Put Option at its *fixed price component* on January 11, 2001 constituted a Section 16(b) sale of the underlying At Home securities that could be matched to a putative deemed "purchase" of At Home stock on May 18, 2001 under the six-month short-swing profits rules and regulations. *See* Complaint ¶¶ 64–72 (Petitioner's App. G at 57a–59a). In Count II, the Bondholders alternatively alleged that Comcast's acquisition of the Put Option on March 28, 2000 constituted a deemed Section 16(b) sale of the underlying At Home stock that could be matched *not* with any actual or deemed purchase of At Home securities, but rather with Comcast's acquisitions of all of the outstanding shares of three different cable companies which happened to

hold At Home warrants in their investment portfolios. *See id.* ¶¶ 73-76 (Petitioner's App. G at 59a).

Comcast moved to dismiss both counts for failure to state a claim. The district court granted the motion with respect to Count I on the grounds that, under the applicable SEC rules, a Section 16(b) "sale" event occurs when a derivative containing a fixed price component (such as the Put Option) was established, and the subsequent exercise of the derivative at that fixed price is an exempt (irrelevant) occurrence. *See* Petitioner's App. D at 25a–26a. Consequently, the court held that Count I failed to state a claim because more than six months had elapsed between the "only conceivable purchase-equivalent event" (the Put Option's putative "cancellation" on May 18, 2001) and the "only sale-equivalent event" alleged (the Put Option's establishment on March 28, 2000). *See id.* at 25a. The district court dismissed Count II because it determined that Comcast's purchases of the cable companies' shares were not vehicles for speculating in the At Home warrants held by those companies in their investment portfolios and thus fell outside the scope of Section 16(b). *See id.* at 29a.

B. The Second Circuit's Decision And The SEC's Amicus Brief

On appeal, the Second Circuit affirmed the dismissal of the Bondholders' claims. After oral argument but prior to rendering its decision, the Second Circuit solicited comment from the SEC on the Bondholders' novel Section 16(b) theories. With respect to the issue presented in Count I, the SEC reasoned that the *establishment* of the Put Option must be deemed the operative Section 16(b) event because the hybrid's fixed price component presented an immediate opportunity to abuse inside information, whereas the subsequent exercise of the option at the fixed price was exempt under Rule 16b-6(b). *See* Comcast's App. A at 13a. On Count II, the SEC concluded that Comcast's purchases of the

cable companies' securities did not constitute purchases of At Home securities within the scope of Section 16(b) because "indirect and incidental acquisition[s]" pursuant to change of control transactions are not vehicles for speculative insider trading of the sort that Congress enacted the statute to prevent. *Id.* at 17a.

As to Count I, the Second Circuit agreed with the SEC and the district court that the Put Option was indeed a hybrid derivative containing "both fixed and floating [price] components." Petitioner's App. A at 4a. From this foundation, the court held that Rules 16b-6(a) and (b) easily "decide[d] this case" by their plain terms. *Id.* at 8a. Because the Put Option contained a fixed price, Rule 16b-6(a) mandated that the *acquisition* of the Put Option be considered a Section 16(b) sale of the underlying At Home shares; further, because the Put Option was eventually exercised pursuant to its fixed price component, that event was *exempt* by operation of Rule 16b-6(b). *See id.*

The Second Circuit also affirmed the district court's dismissal of Count II, but on different grounds. The circuit court found that the plain language of Section 16(b) precluded matching transactions in the securities of more than one issuer:

> Section 16(b) speaks of matching transactions in the equity securities of one issuer, and disgorging 'any profit realized . . . from any purchase and sale, or any sale and purchase, of *any equity security of such issuer*.' Use of the singular ('any equity security' and 'such issuer') supports an inference that a transaction in the equity securities of one company [*i.e.*, the cable companies] cannot be matched with a transaction in the equity securities of another [*i.e.*, At Home].

Id. at 10a.

REASONS FOR DENYING THE WRIT

I. ON COUNT I, THE SECOND CIRCUIT CORRECTLY HELD THAT THE ACQUISITION OF THE PUT OPTION WAS A SECTION 16(B) SALE AND THAT ITS SUBSEQUENT FIXED-PRICE EXERCISE WAS EXEMPT

A. The Lower Courts Correctly Applied The Rules Under Section 16(b) To The Put Option

SEC Rule 16a-1(c) defines the term "derivative security" to include "any option . . . with an exercise or conversion privilege at a price related to [or] a value derived from the value of an equity security." 17 C.F.R. § 240.16a-1(c). As alleged in the Complaint, the Put Option is plainly an "option" with an exercise price "related to" or "derived from the value of" an equity security (here, At Home common stock). More precisely, within the broader class of derivative securities, the Put Option qualifies as a "put equivalent position" because it "increases in value as the value of the underlying equity decreases." *Id.* § 240.16a-1(h).

In light of the recognized equivalence between derivative instruments and their underlying equity securities (*see infra* n.3), Rule 16b-6(a) provides that the "*establishment* of . . . a put equivalent position . . . shall be deemed a sale of the underlying securities for purposes of Section 16(b)." *Id.* § 240.16b-6(a) (emphasis added). To avoid double liability and recovery with respect to the same instrument, Rule 16b-6(b) provides that the *exercise* of a put equivalent position is an exempt event for Section 16(b) purposes:

> [T]he closing of a derivative security position as a result of its *exercise* or conversion shall be exempt from the operation of Section 16(b), and . . . the disposition of underlying securities *at a fixed exercise price* due to the *exercise* of a put equivalent position shall [also] be exempt. . . .

Comcast's App. B at 35a (emphasis added).

Applying these rules, a Section 16(b) sale event occurred on March 28, 2000 when the Put Option was established, and the subsequent closing of the Put Option when it was exercised at its fixed-price component more than ten months later was a non-event for purposes of the statute. Because the putative "purchase" event alleged in Count I occurred on May 18, 2001, nearly fourteen months after the establishment of the Put Option, Section 16(b) does not apply.

This result—reached by both the lower courts and the SEC—is entirely proper, given that the acquisition of a derivative instrument such as the Put Option guarantees its holder an opportunity to sell a maximum number of underlying shares at a *minimum* price of $48 per share. If the acquisition of the option were *not* deemed to be a sale event, then the holder of such an instrument with inside information that would adversely affect stock price could simply (i) acquire such an option with a minimum exercise price of $48 per share, (ii) buy shares in the market the next day, say, at $45 per share, (iii) wait six months and a day before exercising the option, and (iv) realize an unrecoverable $3 per share short-swing profit. In other words, the approach which the Bondholders steadfastly advocated below would reopen the very loophole that the SEC sought to close through its 1991 amendments of the rules under Section 16(b).[3]

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[3] One of the factors motivating the SEC's 1991 amendments to the rules under Section 16(b) was the concern that the former rules permitted insiders to exploit non-public information without liability by engaging in transactions in fixed price derivative securities as exemplified above. *See Ownership Reports and Trading by Officers, Directors, and Principal Security Holders*, Exchange Act Release No. 28,869, 1991 WL 292000 (Feb. 21, 1991), at *11 ("The functional equivalence of derivative securities and their underlying equity securities for Section 16 purposes requires that the acquisition of the derivative security be deemed the significant event, not the exercise. Failure to recognize [this] would permit insiders

B. The Arguments Presented In The Bondholders' Petition Do Not Identify Any Error In The Lower Courts' Application Of The Applicable Rules

1. *The Bondholders Improperly Raise A New Argument In Their Certiorari Petition*

In their petition, the Bondholders claim that the "driving issue" in this case, which was incorrectly decided by the circuit court, is "*when* the matching sale occurred for § 16(b) purposes" with respect to the Put Option: (i) upon acquisition on March 28, 2000; (ii) on February 2, 2001, fifteen trading days following exercise; "or (iii) on *both* dates *as At Home argued to the Second Circuit.*" Cert. Pet. at 9 (italics in original; underlining added). As to the third point, this representation is misleading. The Bondholders never argued in the district court that a sale event occurred *both* upon establishment and exercise of the Put Option, and did not address this argument in the Second Circuit until after oral argument was complete and the parties were asked to comment on the SEC's amicus brief.

In the Second Circuit, the Bondholders argued that the district court committed reversible error when it held that "a Section 16(b) sale 'first' occurred when the Put [Option] was created and that a 'second' Section 16(b) event might have occurred when the number of shares and price per share were fixed 11 months later" when the Put Option was exercised (if such exercise were at the floating price component). Appellant's Br. at 2. Indeed, in criticizing the district court's observation that a hybrid option exercised at its floating price component (a situation not raised by the facts in this case) may result in two events, the Bondholders vehemently argued that the Put Option was *not* a hybrid derivative, did *not*

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to evade disgorgement of short-swing profits simply by . . . *buying underlying stock and buying put options.*") (emphasis added).

contain a fixed price component, did *not* present an opportunity for speculative abuse upon acquisition, and thus could *not* have given rise to Section 16(b) events *both* at acquisition and at exercise:

- "Under governing SEC Rules, a Put Instrument [such as the Put Option] without a fixed price per share is **not** considered a derivative security, and there is no Section 16(b) event, *i.e.* no sale, when such an instrument is created." Appellant's Br. at 20 (emphasis in original);
- "You could have two transactions [with a hybrid derivative]. *It can't be done* [with the Put Option] in our case. . . ." Oral Argument Transcript at 5 (emphasis added);
- "[A] security [like the Put Option] where neither the price per share nor the number of shares are known is *not* deemed a derivative security, and the creation of such a security is *not* [an event] under Section 16(b)." Appellant's Reply Brief at 9 (emphasis added).[4]

Rather, the Bondholders insisted that the Put Option "functioned" or "operated as a floater" (*i.e.*, an instrument with *only* a floating price) and thus did not become a "derivative security" subject to Section 16(b) at all until notice of exercise was given and the share price became determinate.[5]

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[4] *See also* Appellant's Br. at 33 ("As alleged in the Complaint, the [Put Option] does *not* contain one fixed and one floating component." (emphasis added)); *id.* at 37 ("[The Put Option] was *not* susceptible to a fixed conversion at a minimum level and then an additional conversion per a floating component." (emphasis added)); Oral Argument Transcript at 36 ("[T]he one thing that is crystal clear is we said [the establishment of the Put Option] was not a sale. There was *no event* under 16(b) until *after* [Comcast] gave notice [of its intent to exercise] and you knew the number of shares and the price of those shares." (emphasis added)).

[5] *See, e.g.*, Appellant's Br. at 5 (arguing that the Put Option "functioned as a 'floating put'"); *id.* at 20 ("the Put at issue here operated as a

On this basis, the Bondholders argued that the *first and only* Section 16(b) event with respect to the Put Option occurred upon its *exercise*:

- "[On February 2, 2001 (*i.e.*, 15 trading days after Comcast exercised the Put Option)], and *only* at that time, did AT&T have a binding obligation to buy a fixed number of shares at a set price; at *only* that time was a 'put equivalent position' established which, under SEC Rules, is the equivalent of a Section 16(b) sale." Appellant's Br. at 17 (emphasis added);
- "[B]ecause the [Put Option] here functions like a floater, the Court should apply Rule 16a-1(c)(6) on its face, and treat the Put as a derivative security within the meaning of the Rule *only* when the price per share is set for the first time—that is, 15 days after notice of exercise was given. . . ." *Id.* at 41 (emphasis added).
- "*Only* fifteen days after . . . Comcast gave notice to AT&T of [its] intent to exercise the [Put Option] did this instrument become a derivative security and a 'sale' occur under Section 16(b)." Appellant's Reply Br. at 9 (emphasis added).[6]

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floater"); *id.* at 28 (arguing that the Put Option "functioned as a floater"); 41 (same).

[6] *See also* Appellant's Br. at 20 ("[A]s alleged in the Complaint, the Section 16(b) sale occurred . . . after notice had been given and the number of shares and price per share was [sic] first set."); *id.* at 32 ("[A]s alleged in the Complaint, the Put [Option] was not established under the SEC Rules until February 2, 2001 when the number of shares and price per share were set by operation of the [hybrid] pricing mechanism. . . ."); Appellant's Reply Br. at 9 ("*Only* fifteen days after . . . Comcast gave notice to AT&T of [its] intent to exercise the [Put Option] did this instrument become a derivative security and a 'sale' occur under Section 16(b)." (emphasis added)).

In sum, up until after oral argument in the Second Circuit, it has never been the Bondholders' position that the Put Option presented two opportunities for speculative abuse, much less that it gave rise to two distinct Section 16(b) events. To the contrary, the Bondholders expressly argued that recognizing the possibility of two sale events to calculate profits on a hybrid option exercised at its floating price component would be an "egregious error" that would "only serve to confuse market participants, their advisors and courts."[7] Appellant's Reply Br. at 12. As this Court has routinely recognized, certiorari should not be granted where a petitioner presses an argument which it did not raise (or, as here, emphatically and consistently *disavowed*) below. *See, e.g., City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 258

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[7] The Bondholders' only non-derisory reference to the notion that the Put Option could present two Section 16(b) events appeared in supplemental briefing solicited by the Second Circuit to comment on the SEC's *amicus* brief. Even there, however, the Bondholders did not endorse a two-event approach to the Put Option, but simply noted that "nothing in the SEC's perfunctory discussion precludes a finding" that the Put Option presented two opportunities for speculative abuse. Appellant's Supp. Br. at 4. In fact, this characterization of the SEC's opinion is incorrect: the SEC specifically noted that "[i]f inside information is learned only after the fixed price is set [*i.e.*, upon acquisition], the information *cannot be abused* in later exercising at the fixed price." Comcast's App. at 13a (emphasis added). In any event, even if the Bondholders' change of heart could be viewed as genuine, it came too late. The Bondholders could not raise an argument in the Second Circuit that they failed to raise in the district court. *Davenport v. Harry N. Abrams, Inc.*, 249 F.3d 130, 132 (2d Cir. 2001) (argument not raised in the district court should not be considered on appeal); *Mellon Bank N.A. v. United Bank Corp.*, 31 F.3d 113, 116 (2d Cir. 1994) (same); *Burnette v. Carothers*, 192 F.3d 52, 58 (2d Cir. 1999) (appellants waived an argument not raised in the district court). They certainly could not raise such an argument for the first time in a supplemental brief after oral argument. *See, e.g., Cioffi v. Averill Park Cent. Sch. Distr. Bd. of Ed.*, 444 F.3d 158, 169 (2d Cir. 2006) (new argument raised for the first time in reply brief was untimely and deemed waived).

(1987) (dismissing writ as improvidently granted, where position advocated by petitioner before the Supreme Court was not pressed at the district or circuit level); *U.S. v. Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider issue which was first raised in certiorari petition).

2. *The Bondholders' Reliance On Rule 16a-1(c)(6) Is Misplaced*

Paradoxically, at the same time that they press their new "two-event" theory, the Bondholders persist in arguing that the Put Option was not a derivative security *at all* within the meaning of Rule 16a-1(c)(6) because neither "the actual number of shares to be sold [nor] the price per share to be paid" were fixed at the time the instrument was established. Cert. Pet. at 5. This argument is wrong for several reasons.

In the first place, as the lower courts recognized, the cited rule requires only that an instrument's exercise or conversion *price* be fixed. Rule 16a-1(c)(6) excludes from the definition of derivative security "rights with an exercise or conversion privilege at a *price* that is not fixed." 17 C.F.R. § 240.16a-1(c)(6) (emphasis added). The rule does *not* require (or even suggest) that the number of underlying shares subject to the instrument be fixed in order for it to qualify as a "derivative security."

Next, it is plain here that the Put Option *did* contain a fixed exercise price: $48 per share. As the Second Circuit correctly noted, this reality cannot be ignored simply because the Put Option also contained a floating price component:

> As with many hybrid options . . . the [Put Option] contained a possible fixed price ($48 per share) payable depending on the market price at the time of exercise. *The prospect of a higher exercise price does not mean that there is no fixed-price component; the prospect of a higher price is what makes the option a "hybrid" in the first place.*

Petitioner's App. A at 5a n.2 (emphasis added).

In any event, as the Second Circuit and district court rightly observed, the maximum number of shares subject to the Put Option for Comcast (31,253,180) is easily calculated by dividing the total consideration the option's writer could be required to pay Comcast—$1,500,152,640 (*see* Petitioner's App. H at 72a)—by the fixed price of $48 per share (which was the minimum sale price possible under the Put Option). *See* Petitioner's App. A at 5a n.2.

Finally, there is no support in the SEC rules for the Bondholders' newly-asserted argument that a hybrid like the Put Option that was exercised at its fixed price component presented *two* opportunities for abuse and thus gave rise to Section 16(b) sales "on *both* dates." Indeed, if the Put Option did not contain a fixed price component *ab initio*, there would be no conceivable reason—and the Bondholders have not identified any basis in the rules—for treating its establishment as a sale on March 28, 2000. To the extent that the Bondholders now agree that the Put Option *did* contain a fixed price option, Rule 16b-6(a) requires that its establishment be treated as a sale event, but the Bondholders cite no rule that would require—much less permit—the subsequent fixed price exercise to be treated as a second sale. To the contrary, Rule 16b-6(b) (which the Bondholders did not see fit to include in their appendix) requires that the Put Option's exercise at its fixed $48 price component be *exempt* from the statute.[8] *See* Comcast's App. B at 35a.

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[8] To clarify, the Bondholders' proposed two-step approach for a hybrid put exercised at its *fixed* price component (such as the Put Option) must be distinguished from the two-step calculation of short swing profits for a hybrid option exercised at its *floating* price, a situation not presented by the facts of this case. As stated in the text above, the Bondholders' approach contravenes the SEC rules because Rule 16b-6(b) expressly requires that the Put Option's exercise at its fixed price component be exempt. On the other hand, the SEC rules do not forbid—and, in addition to the district court in this case, at least one other court has recognized—

3. *The Bondholders' Self-Defeating "Market Reality" and "Increased Risk" Arguments*

The Bondholders also fault the circuit court's conclusion that the exercise of the Put Option at its fixed price component was a non-event by application of Rule 16b-6(b). In so ruling, the Bondholders contend, the Second Circuit improperly "refused" to consider "market realities" and "ignored [that] the risk of speculative abuse with respect to the Put . . . dramatically increased as . . . Comcast approach the point when [it] could file a notice [of exercise] under the Put and when the number of shares and the price per share would be set for the first time." Cert. Pet. at 10. This argument is misplaced for several reasons.

First, it is clear that what the Bondholders characterize as "marketplace realities" (*i.e.*, the fact that "all . . . Comcast knew" on March 28, 2000 was that the Put Option entitled it to sell up to 31,253,180 shares of At Home at a minimum price of $48 per share, *see* Cert Pet. at 10) were simply the terms of the Put Option itself. *See supra* at 1, 12–13. Contrary to the Bondholders' assertion, the Second Circuit took this reality into account when it rendered its decision. *See, e.g.*, Petitioner's App. A at 4a–5a (discussing operation of hybrid pricing mechanism); *see id.* at 5a n.2 (noting that the "maximum number of shares [subject to the Put Option] is likewise fixed").

Second, this "market reality" argument rings hollow given that the Bondholders fault the lower courts for having taken such realities into account. For example, the Bondholders criticized the district court for concluding that the Put Option's floating price component was "irrelevant" at the

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the application of a two-step approach to calculate short-swing profits from a hybrid option exercised at its floating price. *See Schaffer v. CC Invs., LDC*, 280 F. Supp. 2d 128 (S.D.N.Y.), *recon. granted in part*, No. 99-2821, 2003 WL 22480052 (S.D.N.Y. Oct. 31, 2003).

time of exercise based on the "undisputed" reality (confirmed in the Complaint, no less) that the market price for At Home stock in the days preceding exercise was "far below the fixed minimum of $48 per share." Petitioner's App. D at 26a.[9]

Equally spurious is the Bondholders' assertion that the circuit court failed to consider the "reality" that an insider holding an instrument like the Put Option cannot engage in "effective hedging" at the time it is established. Cert. Pet. at 10; *see also id.* at 11 ("Hedging . . . do[es] not work when a party has no idea of the number of shares to be hedged."). This argument is a straw man, and makes no more sense now than it did when the Bondholders presented it below.

Section 16(b) is not concerned with hedging; rather, its purpose is to deter insiders from speculating based on inside information by requiring the disgorgement of profits earned by an insider from matching purchases and sales of issuer securities occurring within a six month period. Any "hedging" an insider might try to engage in (be it "effective" or not) with respect to the acquisition of an instrument like the Put Option would itself be treated as a Section 16(b) event, and the "loss" hedged against would be subject to immediate disgorgement. Moreover, the very notion that an insider, benefiting from access to non-public information and holding a *long* derivative position, would need (or bother) to engage in hedging is absurd: if the instrument's exercise price were unfavorable relative to the prevailing market price (*e.g.*, if the exercise price for a call option is greater than market price), all the holder would need do to avoid a "loss" would be to *refrain from exercising the option.*

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[9] *See* Oral Argument Transcript at 9 ("When Cox and Comcast [exercised the Put Option], your Honor, they said, we assume the price will be $48. Only the district court knew, said it was undisputed that he stock price was going to be [$]48. Wrong; it was disputed, your Honors. Nobody knew. . . .").

Fourth, and more fundamentally, the Bondholders' argument that the "risk" of speculative abuse with respect to the Put Option "dramatically increased" as the "10-month waiting period came to end" (*i.e.*, when the Put Option first became exercisable) makes no sense whatsoever. On page 11 of their petition, the Bondholders provide an example which purportedly demonstrates why the exercise of a hybrid at its *fixed* price component should not be an exempt event as required by Rule 16b-6(b). In that example, the Bondholders posit that, more than ten months after the option was established, an insider could obtain non-public information indicating that At Home planned to release bad and then good news. According to the Bondholders, the insider could (i) wait until the release of bad news when the stock price drops to $24 per share, (ii) exercise the Put Option at the fixed price of $48 per share, and then (iii) immediately buy At Home stock in the market at $24 per share before the good news is released and the price rebounds. The Bondholders argue that, unless the fixed price exercise is also treated as a Section 16(b) sale, this $24 per share profit could not be recovered.

What the Bondholders fail to mention (or, apparently, to even realize) is that the "risk" which they deem intolerable in the foregoing example is *no different* than the "risk" presented by a pure fixed price option (i.e., one exerciseable at $48 per share *only*). As in the Bondholders' scenario, the holder of such an option could profit in *exactly the same manner* as in the prior example by (i) waiting until the stock dropped to $24, (ii) exercising the put at its $48 per share price, and then (iii) immediately buying back shares in the market at $24. The profit realized here, of course, would plainly not be subject to disgorgement because the closing of the option and sale of underlying securities would undeniably be exempt by operation of Rule 16b-6(b) *See* 17 C.F.R. § 240.16b-6(b).

In short, if the "risk" described by the Bondholders can possibly be viewed as "unacceptable," the fault lies in the

Section 16(b) rules themselves, not in their faithful application by the Second Circuit and the district court. Indeed, what the Bondholders complain about is the reality that Section 16(b), a strict liability statute, "'is simply not an antidote to all the ills that may plague the securities market.'" Petitioner's App. A at 12a (quoting *Heublein, Inc. v. Gen. Cinema Corp.*, 722 F.2d 29, 31 (2d Cir. 1983)).

4. *The Bondholders' Spurious "Hindsight" Argument*

Finally, the Bondholders condemn the Second Circuit for establishing a "hindsight" test for applying Section 16(b) to "complex hybrid instruments." Cert. Pet. at 12. This criticism is both unpersuasive and misplaced.

As an initial matter, the Bondholders provide no explanation as to why a "hindsight" application would be problematic, much less inconsonant with the broader statutory regime. Indeed, they would be hard pressed to do so, given that Section 16(b) expressly exhorts courts to look both forward *and backward* from a purchase of issuer securities to find a profit-making sale. *See* 15 U.S.C. § 78p(b) ("[A]ny profit realized by [an insider] from any purchase and sale, *or any sale and purchase*, of any equity security of [the] issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer.").

In any event, the Second Circuit's decision did not establish a "hindsight" test. Strictly applying Rules 16b-6(a) and (b), the court held: (i) that the establishment of the Put Option on March 28, 2000 constituted a matchable sale of the "maximum number" of At Home stock at $48 per share; and (ii) that the closing of the Put Option approximately 11 months later as a result of its fixed price exercise was a statutorily exempt event. *See* Petitioner's App. A at 8a. This result required no "hindsight" whatsoever.

With respect to the *hypothetical* exercise of the Put Option at its *floating* price component (an event which the Bondholders concede did not occur), the Second Circuit exhibited restraint and expressly declined to formulate a legal rule concerning facts not presented in this case. However a floating price exercise might or should be treated, because the Put Option was exercised at its *fixed* price component here (an exempt event under Rule 16b-6(b)), the court's determination that a Section 16(b) sale event "occurred only with the acquisition of the . . . options" was indisputably correct. *Id.*

II. ON COUNT II, THE LOWER COURTS CORRECTLY DETERMINED THAT COMCAST'S PURCHASES OF CABLE COMPANY SECURITIES COULD NOT BE MATCHED TO ITS DEEMED SALE OF AT HOME SECURITIES

A. The Lower Courts Correctly Ruled That The Challenged Transactions Fall Outside The Scope Of Section 16(b) As Determined By The Statute's Plain Language

In Count II of their Complaint, the Bondholders concede that the *establishment* of the Put Option was a Section 16(b) sale event, but improperly seek to match that sale, not to any purchase of At Home securities, but rather to Comcast's acquisition of the shares of three cable companies—unrelated to At Home—for nearly **$10 billion**. In advancing this claim, the Bondholders seek to equate the purchase of cable company shares with Section 16(b) purchases of the securities held by those companies in their investment portfolios, which in this case happened to include At Home warrants.[10] The Second Circuit (as well as the district court and the SEC)

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[10] As the district court noted, the maximum potential value of the warrants was less than 3% of the $10 billion Comcast spend to acquire the cable companies. *See* Petitioner's App. D at 29a n.12.

correctly determined that the transactions alleged in Count II do not fall within the short-swing statute.

On its face, Section 16(b) is geared toward preventing an issuer's insiders from profiting from non-public information by engaging in transactions in "any equity security" of "such issuer." 15 U.S.C. § 78p(b). As the Second Circuit has rightly recognized, the statutory "[u]se of the singular ('any equity security' and 'such issuer') supports an inference that a transaction in the equity securities of one company cannot be matched with a transaction in the equity securities of another." Petitioner's App. A at 10a. In other words, by its express terms, Section 16(b) applies only to matching transactions involving the securities of the *same* issuer.

Because Count II of the Complaint sought to match transactions in the securities of *different* issuers (*i.e.*, purchases of cable companies' securities with a deemed sale of At Home securities), the circuit court correctly concluded that the Bondholders had not pled a viable Section 16(b) claim. In so ruling, the court was not blazing new ground. To the contrary, the decision below marked the third time that the Second Circuit has refused to expand the statute to embrace situations where the securities actually bought and sold (or deemed bought and sold, in the case of derivative instruments) were of different issuers.

In *American Standard Co. v. Crane Co.*, the Second Circuit addressed the fundamental question presented by the Bondholders' Count II: "whether Section 16(b) permits a statutory liability to attach by matching the purchase[] of the shares of one 'issuer' against the sale of shares of another 'issuer.'" 510 F.2d at 1057. After extensive analysis of the statute's text and legislative history, the court squarely ruled that "the style and substance [of the statute] lead to the conclusion that Congress was concerned with a *single* issuer." *Id.* at 1059 (emphasis added); *see also id.* at 1058 ("The statute speaks of 'such issuer' in the *singular*. There is no room for a

grammatical construction that would convert the singular into a plural.") (emphasis added). Based on this plain reading of the statute, the court held that a purchase of a pre-merger company's securities could not be matched for Section 16(b) purposes to a sale of the post-merger company's securities. This Court denied petitioner's subsequent certiorari petition. 421 U.S. 1000.

The Second Circuit reached the same result more recently in *Strauss v. Comcast Corp.*, 149 Fed. Appx. 15 (2d Cir. 2005). There, plaintiff sought to match (i) Comcast's sale of its shares in QVC, with (ii) third-party ITH's purchase of GSI shares. *See id.* at *16. Notwithstanding plaintiff's allegation that QVC owned a sizeable stake in ITH, and that ITH was a 10% beneficial owner of GSI stock, the court held that the case did "not fall within the purview of Section 16(b) because the issuer of the securities purchased [*i.e.*, GSI] is substantially separate from the issuer of the securities sold [*i.e.*, QVC]." *Id.*

As such, the Second Circuit's ruling that the Bondholders' allegations of purchases and sales of different issuers' securities failed to state a cognizable Section 16(b) claim was correct and consistent with its prior holdings in *American Standard* and *Strauss*. Alternatively, Count II was properly dismissed, as stated by the district court, on the basis of the "unorthodox transaction" doctrine. *See* Petitioner's App. D. at 28a–29a. To the extent that Comcast's purchase of the cable companies' shares can be viewed at all as "transactions" in the issuer securities held by those companies in their portfolios, they were manifestly *not* the type of "garden-variety" transactions to which Section 16(b) presumptively applies. Rather, the "indirect" acquisition via change-of-control transactions alleged in Count II are, on their face, borderline or unorthodox—a fact borne out by the total

absence of decisional authority showing that Section 16(b) has *ever* been applied in such circumstances.[11]

In *Kern County*, this Court endorsed a "pragmatic approach" to analyzing such borderline transactions, which entails an assessment of "whether the transaction may serve as a vehicle for the evil which Congress sought to prevent. . . ." *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 594 (1973). Here, the determination by both the Second Circuit and the SEC that change-of-control transactions such as those alleged in Count II do not present plausible opportunities for speculative abuse amply supports the district court's application of the unorthodox transaction in this case. *See* Petitioner's App. A at 11a ("The SEC convincingly argues that a typical change-of-control transaction does not present an intolerable risk of abuse."), *id.* at 12a ("We conclude that section 16(b) generally does not take account of transactions in which an insider's acquisition of an enterprise holding the issuer's stock entails appreciable risks and opportunities independent of the risks and opportunities that inhere in the stock of the issuer."); *see also* Comcast's App. A at 18a ("While it is not beyond possibility that an acquiror would tailor a change of control transaction to obtain short-swing profits from insider trading, it is certainly not going to be a common scenario. Good faith change in control transactions are not ones 'in which the possibility of abuse [is] intolerably great.'") (quoting *Kern County*, 411 U.S. at 592).

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[11] Given the frequency with which companies buy and sell stakes in one another, indirect or incidental "transactions" in the issuer securities held by the bought and sold companies are inevitable; if such transactions fall within the scope of Section 16(b), claims such as the Bondholders' should be commonplace. They are not. As the district court correctly noted, this "absence of precedent" strongly supports the view that such change-of-control transactions are "unorthodox" to the extent that they concern the portfolio securities held by the subject companies. Petitioner's App. D at 28a.

B. The Countertextual Reading Of Section 16(b) Advocated By The Bondholders Would Create An Unprecedented Expansion Of The Statute Far Beyond Its Literal And Intended Scope

In a transparent attempt to manufacture a "circuit split" meriting grant of certiorari with respect to Count II, the Bondholders claim that the Second Circuit "bypassed clear statutory language in favor of crafting its own definition of 'purchase'" and thereby parted company with "other Circuit courts [which] have continued to interpret definitional terms [in the securities laws] based on their plain meaning." Cert. Pet. at 12, 14. This characterization of the lower court's decision is grossly inaccurate.

In the first place, the Bondholders' contention that the circuit court "judicially legislated a new definition" for the term "purchase" cannot be squared with the decision itself. *Id.* at 2. Nowhere in the court's discussion of Count II did it purport to define that term. To the contrary, as even a cursory review of the decision confirms, the Second Circuit's dismissal of that Count was based upon a strict, plain-language reading of the term "issuer" in Section 16(b).

Moreover, even if the circuit court's decision could be viewed as implicitly propounding a definition of the term "purchase" that departs from 15 U.S.C. § 78c(a)(13), it would not have erred in doing so. Indeed, as this Court has repeatedly recognized, whether a specific transaction constitutes a Section 16(b) event in a given case depends upon whether it gives rise to the type of risk Congress enacted the statute to combat. *See, e.g., Reliance Elec. Co. v. Emerson Ele. Co.*, 404 U.S. 418, 424 n.6 (1972) ("Thus, in interpreting the terms 'purchase' and 'sale,' courts have properly asked whether the particular type of transaction involved is one that gives rise to speculative abuse."); *see also Kern County*, 411 U.S. at 595 (same).

The Bondholders' next argument—that Section 16(b) should be read broadly enough to cover transactions in the securities of multiple issuers because the Second Circuit's strict reading creates a "sizeable loophole in § 16(b) enforcement," Cert. Pet. at 15—fares no better. In its decision, the Second Circuit acknowledged that applying Section 16(b) according to its plain terms would, in certain circumstances, potentially permit insiders to circumvent the statute. As the court expressly recognized, however, Section 16(b) does not (and is not designed to) capture all conceivable forms of insider profiteering. In fact, an insider with non-public information need do nothing more complex to avoid the statute than allow six months and a day to elapse before engaging in a matching transaction. Similarly, a large shareholder could escape Section 16(b) simply by maintaining its beneficial shareholding in the issuer at 9.9%, just below the statutory threshold. Other possibilities abound, all of them more plausible than buying and selling third party companies which happen to hold the subject issuer's securities in their investment portfolios—a tactic that the Second Circuit aptly analogized to "speculating in tractors by buying a farm." Petitioner's App. A at 11a.

Nevertheless, the possibility that Section 16(b) can be "evaded" by insiders using various strategies (be they simple or convoluted) does not warrant the expansion of the statute beyond its strict terms. As the circuit court rightly noted, Section 16(b) "is simply not an antidote to all the ills that may plague the securities market." *Id.* at 12a (internal quotations omitted). Rather, the short-swing statute exists alongside other statutory regimes for combating insider trading: "[t]he more a transaction is crafted to evade section 16(b), the stronger the case [will be] for holding an insider liable under section 10(b)." *Id.* Accordingly, the fact that transactions such as those challenged in Count II do not fall within the scope of Section 16(b) is not a reason to expand the statute beyond its plain terms.

As such, the Bondholders' appeal to policy to expand the statute's scope to reach transactions not covered by its plain terms is misplaced. Indeed, as the Second Circuit has previously recognized, because Section 16(b) establishes strict liability within somewhat arbitrary parameters, policy considerations weigh in favor of *limiting*, rather than extending, the statute's reach. *See Gwozdzinsky v. Zell/Chillmark Fund, L.P.*, 156 F.3d 305, 310 (2d Cir. 1998) ("The statute, as written, establishes strict liability for all transactions that meet its mechanical requirements. When courts have looked to policy, it [has been] to avoid the sometimes harsh results of this inflexible rule.").

Finally, the countertextual and open-ended view of Section 16(b) advocated by the Bondholders (and correctly rejected by the Second Circuit) would lead a host of absurd and unreasonable results. Assume, for example, that Company A (a statutory insider with respect to Issuer X) owns a major stake in Company B, which holds a small number of Issuer X shares in its securities portfolio. Under the Bondholders' theory, if Company A simply bought additional shares of Company B, and then sold those shares within six months, those transactions would generate disgorgeable short-swing profits not only with respect to Company B stock, but also with respect to Issuer X shares. Moreover, these profits would be based on the difference in Issuer X share prices notwithstanding that there was never any actual transaction in Issuer X securities. The same holds true for any *other* issuer securities which Company B happened to hold in its portfolio, resulting in an endless sequence of Section 16(b) events relating to securities not actually traded.

In short, far from creating an "expandable loophole," the Second Circuit's adherence to the plain language of Section 16(b) ensures that the threat of its draconian penalties will not curtail legitimate business transactions about which Congress was plainly not concerned when it enacted the short-swing statute.

CONCLUSION

For the foregoing reasons, the Bondholders' petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 30, 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 05-0115-CV

AT HOME CORPORATION,
Plaintiff-Appellant,

v.

COX COMMUNICATIONS, INC., COX@HOME, INC.,
COMCAST CORPORATION, COMCAST ONLINE
COMMUNICATIONS, INC., COMCAST PC INVESTMENTS, INC.,
BRIAN L. ROBERTS AND DAVID M. WOODROW,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, SUBMITTED AT THE REQUEST OF THE COURT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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AT HOME CORPORATION,
Plaintiff-Appellant,

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COX COMMUNICATIONS, INC., COX@HOME, INC.,
COMCAST CORPORATION, COMCAST ONLINE
COMMUNICATIONS, INC., COMCAST PC INVESTMENTS, INC.,
BRIAN L. ROBERTS AND DAVID M. WOODROW,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, SUBMITTED AT THE REQUEST OF THE COURT

INTRODUCTION

The Securities and Exchange Commission submits this brief as *amicus curiae* in response to a request by the Court.

This action was brought by At Home Corporation ("At Home," "issuer," or "plaintiff") under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b), to recover alleged short-swing profits obtained by insiders of At Home. The complaint alleges that defendants—Cox Communications, Inc., Comcast Corporation and their affiliates—sold and then purchased, or purchased and sold, At Home

equity securities within six months. The defendants are alleged to have acted as a group that owned more than 10 percent of At Home securities, and thus to be statutory insiders of At Home. The suit seeks recovery of profits the defendants allegedly realized on these short-swing trades. The district court dismissed plaintiff's Section 16(b) claims. *See At Home Corporation v. Cox Communications, et al.*, 340 F. Supp. 2d 404 (S.D.N.Y. 2004). The Commission agrees with the district court that defendants are not liable under Section 16(b).

BACKGROUND

At Home was founded by a number of cable companies in March 1995 to provide cable-based internet access to customers (Compl. ¶18). On March 28, 2000, the defendants, Cox and Comcast, entered into a letter agreement with AT&T ("agreement") in which Cox and Comcast acquired, respectively, a put to sell to AT&T up to $1.4 billion and $1.5 billion in At Home shares. Under the terms of the agreement, Cox and Comcast could sell each share for the higher of (1) $48 or (2) a floating average market price at the time of exercise (A-133; Compl. ¶45).

Defendants notified AT&T of their intention to exercise their puts on January 11, 2001. At that time, At Home's shares were selling for an average $7.72 per share (Compl. ¶53). Accordingly, defendants' notices to AT&T stated that the defendants "assumed" that the purchase price would be $48 per share (A-165, 168). AT&T did not want the shares. AT&T and the defendants entered into a new agreement on May 18, 2001 whereby the defendants canceled their puts in exchange for 155.3 million shares of AT&T stock worth $3.43 billion (Compl. ¶56).

The plaintiff alleged that Cox and Comcast sold At Home shares for purposes of Section 16(b) on January 11, 2001, when they provided notice of their intent to exercise the

puts.[1] This was within six months of the May 18, 2001 agreement to rescind the puts, which plaintiff contended was a purchase of At Home securities. The district court agreed that the rescission was a purchase, but held that the earlier sale occurred on March 28, 2000, when the puts were established, so that the sale and purchase took place more than six months apart, and were thus not subject to Section 16(b).

The plaintiff alternatively claimed that if the sale occurred on March 28, 2000, Comcast made matching purchases when, between January and August 2000, it acquired three cable companies that held At Home securities. The district court dismissed this claim, holding that these indirect acquisitions were not cognizable transactions under Section 16(b).

The plaintiff appealed, and this Court has sent a letter to the Commission inviting it to answer five questions. We address those questions in order.

ARGUMENT

I. THE ESTABLISHMENT OF THE PUTS IN MARCH 2000 CONSTITUTED A SALE OF AT HOME STOCK FOR PURPOSES OF SECTION 16(b).

The Court asks "[w]hether the establishment of the puts on March 28, 2000 constituted a sale of At Home securities for purposes of section 16(b) * * *." It did. Before 1991, the purchase or sale of securities underlying a derivative security occurred on the exercise of the derivative, rather than upon its creation. In 1991, the Commission noted that this left "open a significant potential for short-swing abuse in trading derivative securities." *Ownership Reports and Trading By*

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[1] Alternatively, the plaintiffs contended that the sales occurred on February 2, 2001, at the end of the 30 day period for determining if the fixed rate or the floating rate was higher.

Officers, Directors and Principal Securities Holders, Exchange Act Rel. No. 28869, 56 Fed. Reg. 7242, 7250 (Feb. 21, 1991). In that release, the Commission offered the following example:

> [A]n insider with knowledge of a positive material development, to be announced shortly, determines that while he wants to retain his existing equity position, he wants to take advantage of the information, so he purchases issuer warrants. After the public announcement and rise in the stock price the insider sells his common stock, obtaining a short-swing profit, knowing that he can replace the shares at a predetermined price since he holds the warrants. Under the former rules, he could simply wait six months and a day to exercise the warrants so the profit would not be subject to section 16(b) and not recoverable by the company.

Id. at 7250. Likewise, an insider who knows of impending negative information can negotiate a fixed price put, enabling it to sell, after the negative information is released and the price falls, at the higher price. The insider unfairly uses the inside information by fixing the price when the derivative is created, not when it is exercised.

In 1991, the Commission amended the rules so that the acquisition of a "derivative security" is also considered the acquisition of the underlying securities for purposes of Section 16(b). "[D]erivative security" was defined to mean "any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security * * *." Rule 16a-1(c), 17 C.F.R. 240.16a-1(c). Rule 16b-6(a), 17 C.F.R. 240.16b-6(a), provides:

> The * * * establishment of or increase in a put equivalent position or liquidation of or decrease in a

> call equivalent position shall be deemed a sale of the underlying securities for purposes of section 16(b) of the Act * * *.

A "put equivalent position" is defined by Rule 16a-1(h), 17 C.F.R. 240.16a-1(h), to mean "a derivative security position that increases in value as the value of the underlying equity decreases, including, but not limited to, a long put option and a short call option position." A put with a fixed exercise price increases in value as the price of the underlying stock decreases because the spread between the market price and the fixed exercise price increases.

On the other hand, a floating price linked to the market price does not have that attribute. The 1991 rules draw a sharp distinction between fixed and floating prices. The Commission explained that "[r]ights without a fixed exercise price do not provide an insider the same kind of opportunity for short-swing profit since the purchase price is not known in advance." *Ownership Reports*, Exchange Act Rel. No. 28869, 56 Fed. Reg. at 7252. The Commission stressed that "[t]he opportunity to lock in a profit begins when the exercise price is fixed; at that time, the right becomes a derivative security subject to section 16." *Id.* Conversely, the later *exercise* of a derivative at its *previously* fixed price is exempt from Section 16(b) and has no Section 16(b) consequences. *See* Rule 16b-6(b), 17 C.F.R. 240.16b-6(b).

On the other hand, the Commission explained that:

> [A] right with a floating exercise price is not required to be reported and will not be deemed to be acquired or purchased, for section 16 purposes, until the purchase price of the underlying security becomes fixed or established, which commonly occurs at exercise. Thus, a right to purchase an equity security is deemed acquired as of the date the exercise or conversion price becomes fixed, and the acquisition, absent an exemption, would be

> matchable for section 16(b) purposes with a disposition within six months of the fixing of the price.

56 Fed. Reg. at 7253. "The primary potential for abuse [of inside information] arises at the time of exercise for a floating price derivative security because only at exercise is the price fixed and, therefore, the extent of the profit opportunity defined." Thus, "[b]y treating the exercise of the floating price derivative security as the 'acquisition' of the underlying security, the rules mitigate the incentives for insiders to abuse their informational advantage."[2]

In this case, the March 2000 agreement presented the defendants with puts with a fixed price of $48 paired with puts with a floating price based on a specified market average. In January 2001, with the market price far below $48, the defendants chose to exercise their puts at the fixed price. The opportunity to abuse inside information existed only at the time the fixed exercise price was set. If inside information is learned only after the fixed price is set, the information cannot be abused in later exercising at the fixed price. Because the fixed price was used in this case, the establishment of the puts is when the six month trading period should begin. The district court correctly concluded that the establishment of the puts in March 2000 constituted a sale of At Home stock under Section 16(b).

Plaintiff nevertheless argues that the hybrid security should be treated as a floating price derivative security, as though there were no fixed component. The cornerstone of plaintiff's contention is that, "in contrast to any other instrument in any other reported case of which we are aware, the **only** fixed component at issuance was not the number of shares or price per share, but the **total consideration** to be paid by the

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[2] This is reflected in Rule 16a-1(c)(6), 17 C.F.R. 240. 16a-1(c)(6), which excludes from the definition of a "derivative security" "[r]ights with an exercise or conversion privilege at a price that is not fixed."

grantor of the option (AT&T)." (Appellant's Brief p. 37 (emphases in original)). Thus, "[t]he only fact that all the parties to the Put knew on March 28, 2000 was that AT&T would pay a total of approximately $2.9 billion, but the number of shares and the price per share could not be known until after notice was given and the stock market determined the final price"(Appellant's Brief p. 37-38).

The district court correctly rejected this argument, pointing out that "[t]he specified maximum overall price of $2.9 million, when combined with the specified minimum per-share price of $48, dictated that defendants could sell, at most, 60.4 million shares.[3] Thus the initial agreement *did* limit the number of shares which AT&T would be required to buy." 340 F. Supp. 2d at 410 (emphasis in original).[4]

II. THE MAY 2001 AGREEMENT TO CANCEL THE FIXED PRICE PUTS WAS A PURCHASE FOR SECTION 16(b) PURPOSES.

The Court next asks whether the May 18, 2001 agreement—in which the defendants agreed not to exercise their puts—was a purchase for purposes of Section 16(b). The district court held that it was a purchase but that, since it occurred more than six months after the sale on March 28, 2000, the plaintiff's first claim should be dismissed. That is correct.

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[3] Since both the total and per share prices were fixed, the number of shares with respect to the fixed price component was fixed.

[4] Plaintiff also argues that the holding of the district court is unworkable in cases when the insider exercises a hybrid put at the floating rate because it would require there to be a second sale of the same underlying securities: "There could not be a 'second' sale, because according to the district court, **all** of the shares were deemed sold on March 28, 2000 at $48 per share * * *" (Appellant's Brief p. 37). This is incorrect. Where an insider exercises a hybrid put at the floating price, the fixed price put expires on an exempt basis by virtue of Rule 16b-6(d). The underlying shares become available for a different sale.

Under Rule 16b-6(a) the "liquidation of or decrease in a put equivalent position shall be deemed a purchase of the underlying security for purposes of section 16(b) * * *." The May 2001 agreement explicitly cancelled what had been the defendants' put equivalent position. Rule 16b-6(d), 17 C.F.R. 240.16b-6(d), provides that "[t]he disposition or closing of a long derivative security position, as a result of cancellation or expiration, shall be exempt from section 16(b) of the Act *where no value is received* from the cancellation or expiration" (emphasis added). This agreement does not qualify for that exemption since Cox and Comcast did receive value in exchange for agreeing to forgo the right to exercise their puts.

Defendants nonetheless contend that "[a]fter the March 2000 Put was exercised on January 11, 2002, *there was no put to 'cancel'*" and that the "[c]ourts uniformly have held that 'once an option is exercised, *the option itself ceases to exist* and an enforceable bilateral contract is formed.'" (Brief of Appellee Cox p. 45 (emphases in original); *see also* Brief of Appellee Comcast pp. 38-39). Defendants' argument places semantics over substance: while the defendants gave notice of their intent to exercise the puts, they never, in fact, followed through and transferred any shares to AT&T.

III. COMCAST'S ACQUISITION OF THREE CABLE COMPANIES THAT OWNED AT HOME WARRANTS WAS NOT A PURCHASE OF THE WARRANTS FOR PURPOSES OF SECTION 16(b).

This Court's third question is "[w]hether Comcast's acquisition of three cable companies that owned warrants to purchase shares of At Home stock in January, March and August 2000 should be characterized as a § 16(b) purchase of At Home securities." Under Count II of their complaint, plaintiff urges that if, *arguendo*, as Comcast contends, the creation of the put in March 28, 2000 constituted a 'sale' for purposes of Section 16(b), then that sale can be matched with

Comcast's acquisition of the warrants, which took place within six months of March 28, 2000 (Appellant's Brief pp. 44-46; *See also* Compl. ¶ 74).[5] The plaintiff argues that "purchase," as defined by Section 3(a)(13) of the Exchange Act, 15 U.S.C. 78c(a)(13), includes "any contract to buy, purchase, or otherwise acquire" and that this definition is broad enough to include the purchase of another company that, in turn, owns securities of the issuer (Appellant's Brief pp. 44-46).

The district court held that these transactions are not within the scope of Section 16(b) because the acquisition of the warrants was an incidental part of acquisitions of the three companies. Without deciding whether this amounted to a "purchase" of securities for purposes of Section 16(b), the court held (340 F. Supp. 2d at 411):

> 'In deciding whether borderline transactions are within the reach of the statute, the courts have come to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent—the realization of short-swing profits based upon access to inside information.' *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 594 [ ] (1973). We can conceive of situations where an insider could acquire one company simply (or mainly) to obtain its interests in the subject company, as when the acquired company has few other assets or exists for the sole purpose of trading in shares of the subject company. However, plaintiff has failed to plead any facts giving rise to such a possibility here.

The district court was correct to find that this sort of indirect acquisition in a change-in-control transaction typically does not fall within the scope of Section 16(b). The

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[5] There are no allegations against Cox in Count II.

district court, however, incorrectly resolved the issue by use of *Kern*. The *Kern* Court held that a transaction that literally falls within the scope of Section 16(b) may, nevertheless, be excluded from the section if, on the facts of the case, it does not present a risk of speculative abuse. While the defendant in *Kern* was a greater than 10% owner of stock in the issuer, it also was an unsuccessful hostile tender offeror. To the Court, the critical factors in excluding the defendant from liability under Section 16(b) were that the defendant was forced to sell pursuant to a merger agreement, whose terms it did not negotiate, and, as a hostile tender offeror, the defendant did not have access to inside information. *See Kern*, 411 U.S. at 597-98. This Court has read *Kern* to require that the insider not have access to inside information and/or have no control over the terms of the transaction or its occurrence. *See American Standard, Inc. v. Crane Co.*, 510 F.2d 1043, 1054 (2d Cir. 1974). Here, defendant Comcast does not meet either of those criteria, and we believe *Kern* does not apply.

This case calls for a different approach. The acquisition of At Home warrants here was an indirect consequence of a change-in-control transaction. In general (although there can be exceptions, as we discuss below), this sort of indirect and incidental acquisition should be presumed not to be a "purchase" for purposes of Section 16(b), since it is not the sort of transaction Congress was concerned about. The Supreme Court has stated that "'the only method Congress deemed effective to curb the evils of insider trading was a flat rule taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great.'" *Kern*, 411 U.S. at 592 (*quoting Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418, 422 (1972)). As the Commission explained long ago, a six-month period was chosen because that "arbitrary period" was thought "as roughly marking the distinction between short swing speculation and long term investment." *Notice of Proposal to Adopt a Rule Exempting from the Operation of Section 16(b)*

Certain Acquisitions and Dispositions of Securities Pursuant to Mergers or Consolidations, Exchange Act Rel. No. 4696, 17 Fed. Reg. 3177, 1952 SEC LEXIS 63 (April 9, 1952).

Because Section 16(b) can be harsh in imposing strict liability, "Congress itself limited carefully the liability imposed by §16(b)." *Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232, 252 (1976).[6] "When Congress has so recognized the need to limit carefully the 'arbitrary and sweeping coverage' of §16(b) * * * courts should not be quick to determine that * * * Congress intended the section to cover a particular transaction." *Id.* at 252 (citations omitted). *See also Gollust v. Mendell*, 501 U.S. 115, 122 (1991); H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934).

An insider who seeks to profit from inside information typically will engage in a purchase or sale in the issuer's securities, and then engage in an opposite-way transaction when the information becomes public, and the securities' price is affected. A change in control, however, is typically motivated by a desire to acquire control of a company. It also involves complex negotiations, and many strategic corporate considerations, and often involves regulatory review and approval. While it is not beyond possibility that an acquiror would tailor a change in control transaction to obtain short-swing profits from insider trading, it is certainly not going to be a common scenario. Good faith change in control transactions are not ones "in which the possibility of abuse [is] intolerably great," *Kern*, 411 U.S. at 592.

The plaintiff nonetheless argues that these acquisitions literally meet the words of the definition of "purchase" in Section 3(a)(13) of the Exchange Act. However, the prefatory language to the Exchange Act definitions states that they apply "[w]hen used in this title, unless the *context otherwise*

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[6] *See also Gollust v. Mendell*, 501 U.S. 115, 122 (1991); *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. at 422-25.

requires." Section 3(a), 15 U.S.C. 78c(a) (emphasis added). This Court has "recognized the importance of this introductory phrase in certain situations." *Yoder v. Orthomolecular Nutrition Institute, Inc.*, 751 F.2d 555, 559 (2d. Cir. 1985). For example, Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10), excludes from the definition of "security" "any note * * * which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited." In spite of this language, which would seem to exempt all notes of any quality, so long as of proper duration, this Court has long held, citing the context clause, that the exemption does not apply "literally," but only applies to notes that are the equivalent of commercial paper. *See, e.g., SEC v. American Board of Trade, Inc.*, 751 F.2d 529, 538 (2d Cir. 1984) (Friendly, J.).

Employment of the context clause is likewise appropriate here. As discussed above, Section 16(b) is a strict liability statute. The purpose of the provision must be taken into account when construing the Section 3(a) definitions of "purchase" and "sale" with respect to Section 16(b). Since a change in control transaction will rarely be used to engage in insider trading in securities held as an asset by the acquired company, this sort of indirect acquisition should presumptively be deemed not to be a purchase for purposes of Section 16(b) (or a sale by the prior owners of the company). We say "presumptively" because, as the district court noted, there may be circumstances where an insider uses the acquisition of another entity as a subterfuge in order to acquire underlying securities. The plaintiff, however, should bear the burden of pleading and proving that this indirect acquisition was such an exception, something the plaintiff has not done here.[7]

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[7] This does not mean, as might be thought, that Section 16(b) would cease to be a strict liability statute. It is a strict liability statute with respect to short-term transactions that are properly deemed purchases and sales

IV. THE "UNORTHODOX TRANSACTION DOCTRINE" IS INAPPLICABLE TO THE TRANSACTIONS IN THIS CASE.

This Court next asks "[w]hether the *Kern* 'unorthodox transaction' doctrine supports the District Court's dismissal of either of the relevant claims." As discussed in the prior section, we do not believe that the doctrine should be expanded to apply, as the district court did, to the claim based on indirect acquisition of At Home warrants in three change of control transactions.

Separately, Cox argues that dismissal of plaintiff's *first* cause of action should be affirmed because "[a]s in *Kern County*, AT&T 'undoubtedly knew more about' At Home than Cox at the time of the alleged 'purchase' and 'sale'" (Brief of Appellee Cox pp. 54-55, *citing Kern County*, 411 U.S. at 602). While this might be true, it is not a basis for applying *Kern*, which this Court has read to require lack of access to inside information and/or a forced transaction, neither of which existed here.

V. CONTROLLING DEFERENCE IS OWED BY THE COURT TO THE COMMISSION'S REASONABLE INTERPRETATIONS OF SECTION 16(b) AND RELATED COMMISSION RULES.

The Court asks "[w]hat deference, if any, this Court owes the positions the SEC adopts in its *amicus curiae* brief." This actually presents two questions: (1) what deference is owed to the Commission's construction of its own rules in an *amicus* brief; and (2) what deference is owed to the Commission's construction of the federal securities statutes provided in an *amicus* brief.

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for purposes of the statute. The inquiry here is whether a purchase was involved.

A. This Court and the Supreme Court Have Repeatedly Held that a Court Is Bound by an Agency's Reasonable Interpretations of Its Own Regulations Provided in an *Amicus* Brief.

The deference accorded by the courts to the Commission's interpretations of its own rules in an *amicus* brief is settled law. This Court has repeatedly held that it is "'bound by the SEC's interpretations of its regulations in its *amicus* brief, unless they are 'plainly erroneous or inconsistent with the regulation[s].'" *DeMaria v. Andersen*, 318 F.3d 170, 175 (2d Cir. 2003) and *Levy v Southbrook International Investments, Ltd.*, 263 F.3d 10, 14 (2d Cir. 2001) (*both cases quoting Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 128 (2d Cir. 2000)). *Accord Yourman v. Giuliani*, 229 F.3d 124, 128 (2d Cir. 2000) (deferring to an interpretation of regulations submitted in an *amicus* brief by the Secretary of Labor). In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), the Supreme Court first established the principle that an agency's interpretation of one of its own regulations commands substantial judicial deference such that the agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

More recently, the principle was reinforced in *Auer v. Robbins*, 519 U.S. 452 (1997), where petitioner complained that an agency's interpretation of a regulation came in the form of an *amicus* brief. The Supreme Court declared, "[t]hat does not, in the circumstances of this case, make it any less worthy of deference" because the agency's "position is in no sense a '*post hoc* rationalizatio[n]' advanced by [the] agency seeking to defend past agency action against attack" 519 U.S. at 462 (*quoting Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988)). "There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id. See also*

Barnhart v. Walton, 535 U.S. 212, 217 (2002) (reaffirming *Auer*). As this Court has explained:

> [W]e recognized that an agency's interpretation of its own regulations is entitled to considerable deference, irrespective of the formality of the procedures used in formulating the interpretations. *See Taylor v. Vt. Dep. of Educ.*, 313 F.3d 768, 779-80 (2d Cir. 2002) (*citing Auer v. Robbins* [*supra*, at 461]); *LaFleur v. Whitman*, 300 F.3d 256, 277 (2d Cir. 2002)). We defer to an agency's interpretation of its own regulations because we 'presume that the power authoritatively to interpret [the agency's] own regulations is a component of the agency's delegated lawmaking powers.' *Martin v. Occupational Safety & Health Rev. Com'n.*, 499 U.S. 144, 151 [] (1991).

Ecarnacion v. Barnhart, 331 F.3d 78, 86 (2d Cir. 2003).[8] In light of the well established law in the Supreme Court and this Court, the Commission's interpretations of its rules expressed in this brief are binding, unless they are plainly erroneous or inconsistent with the regulations.

B. This Court Should Accord *Chevron* Deference to Interpretations of the Federal Securities Statutes Provided in Commission *Amicus* Briefs.

The Court also owes controlling deference to the Commission's interpretation of the statute—Section 16(b)—provided in this *amicus* brief. The analysis of this question

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[8] There are three preconditions for applying *Bowles or Auer* deference: the language of the regulation in question must be ambiguous; there must be no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question; and the agency's reading of its regulation must be fairly supported by the text of the regulation itself. *Drake v. FAA*, 291 F.3d 59, 68 (D.C. Cir. 2002) (citations omitted).

begins with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As the Supreme Court has recently summarized:

> In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. 467 U.S., at 865-866, 81 L. Ed. 2d 694, 104 S. Ct. 2778. If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation. *Id.* at 843-844, and n. 11, 104 S. Ct. 2778.

National Cable & Telecommunications Assoc., v. Brand X Internet Services, __ U.S. __, 125 S.Ct. 2688, 2699 (2005).[9]

For an agency interpretation to receive *Chevron* deference, the agency must have been entrusted by Congress with authority to interpret the statute, the statute must be ambiguous and subject to interpretation, and the agency's interpretation must be a reasonable one. The term "purchase" as applied to Section 16(b) is ambiguous. Congress has entrusted the Commission with responsibility for resolving ambiguities in light of the purpose of the statute. Section 16(b) provides that "[t]his subsection shall not be construed

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[9] Prior to *Chevron*, the Court held in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), that the "rulings, interpretations and opinions of" an agency that do not constitute an exercise of lawmaking authority, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment" which are "entitled to respect" to the extent they are persuasive. *Id.* at 140.

to cover * * * any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection." As this shows, Congress did not believe Section 16(b) was self-explanatory and vested the Commission with authority to identify the purpose of the statute and identify transactions which do not contravene the section's purpose.[10]

The Commission has generally done that through rulemaking. However, rulemaking is not a prerequisite for the Commission's views to be accorded *Chevron* deference. While earlier cases focused on the formality of an agency decision, such as whether it was the product of notice and comment rulemaking or of an adjudication, *see Christensen v. Harris County*, 529 U.S. 576, 587 (2000), more recent cases have focused on whether the interpretation is the product of authoritative agency consideration. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court addressed the level of deference to be accorded to Customs Service tariff classifications contained in "letter rulings." The court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise

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[10] In two recent cases, this Court declined to give *Chevron* deference to Commission *amicus* briefs because the statutes at issue did not explicitly look to the Commission to fill in interstices in the statutes. *See Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 34 n.6 (2d Cir.), *cert. granted.*, 126 S. Ct. 34 (2005) (Mem.) (construing provision of Securities Litigation Uniform Standards Act preempting state law securities fraud actions); *In re Enterprise Mortgage Acceptance Co., LLC, Securities Litigation*, 391 F.3d 401, 410 n.8 (2d Cir. 2005) (construing provision in Sarbanes-Oxley Act modifying statutes of limitation in private securities lawsuits). Whatever the merit of those decisions as to those statutes, this case involves a statute, Section 16(b), in which Congress expressly delegated to the Commission that responsibility.

of that authority." *Id.* at 226-27. While the Court noted that "the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of noticeand-comment rulemaking or formal adjudication," the Court added:

> That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.

Id. at 230-31. The Court held that "[t]he fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron*," *Id.* at 231. The opinion, however, gives little conclusive guidance as to what must be shown, since the Court held that the authorities cited to it—letter rulings issued by 46 different scattered Customs offices—were obviously not authoritative agency positions. *See id.* 233.

The next year, however, in *Barnhart v. Walton*, 535 U.S. 212 (2002), the Court achieved some clarity by stating flatly that an agency interpretation may be entitled to *Chevron* deference even when it is neither the product of notice-and-comment rulemaking nor has the force of law. The major factor the Court looked to is the level of *careful consideration an agency has given the question*. *See* 535 U.S. at 222. In *Barnhart* the petitioner, whose application for benefits was denied by the Social Security Administration, asked the Court to disregard the agency's interpretation found in recently promulgated regulations. The Court noted that the interpretation in fact was a "long standing" one and "the fact the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking * * * does not automatically deprive that interpretation of the judicial deference otherwise due" under *Chevron*. 535 U.S. at 221

(citations omitted). Then, turning its attention to the confusion caused by *Christensen* and *Mead*, the Court stated:

> If this Court's opinion in Christensen * * * suggested an absolute rule to the contrary, our later opinion in *United States v. Mead* * * * denied the suggestion. * * * Indeed, *Mead* pointed to instances in which the Court has applied *Chevron* deference to agency interpretations that did not emerge out of notice-and-comment rulemaking. * * * It indicated that whether a court should give such deference depends in significant part upon the interpretative method used and the nature of the question at issue.

535 U.S. at 221-222 (citations omitted).[11] The Court went on to conclude (*id.* at 222):

> In this case the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue. * * *

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[11] As this makes clear, not every informal statement of agency position is to be accorded *Chevron* deference. The Supreme Court has since declined to accord such deference to internal agency guidance, such as that "presented in internal guidance memoranda," *Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 487 (2004), and an internal operating manual, *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003). We believe that the public position articulated here by the Commission itself, with the deliberative process undertaken to reach its position and the explanation of the reasons for that position, is more akin to the sort of articulations contained in rulemaking than it is to internal guidelines.

Later that year, this Court construed Barnhart to mean:

> Less formal interpretations may also be entitled to mandatory deference, depending upon to what extent the underlying statute suffers from exposed gaps in its policies, especially if the statute itself is very complex, as well as on the agency's expertise in making such policy decisions, the importance of the agency's decisions to the administration of the statute, and the degree of consideration the agency has given the relevant issues over time. *See Barnhart v. Walton*, 535 U.S. 212, 122 S. Ct. 1265, 1272, 152 L. Ed. 2d 330 (2002).

Community Health Center v. Wilson-Coker, 311 F.3d 132, 138 (2d Cir. 2002).[12]

The only statutory interpretation in this brief is whether Section 16(b) applies to a transaction where an insider acquires securities of an issuer indirectly by acquiring ownership of a third party company which, in turn, owns securities of the issuer. This is precisely the sort of question that Congress directed the Commission to deal with. Section 16(b) states that it will not apply to transactions which the Commission exempts as not within the purpose of the statute. Because the statute imposes strict liability, the Commission's role in determining when to exempt transactions is of critical importance to application of the statute. Congress and the Supreme Court have been clear that this is a statute which the Commission should assure is not unduly broad. This is, in short, precisely the sort of interstitial issue where *Chevron* deference is due the Commission's informal conclusions; "the

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[12] In *Dabit* and *Enterprise Mortgage*, this Court later cited *Mead* for the proposition that Commission views expressed in an *amicus* brief, rather than a rule or regulation, cannot receive *Chevron* deference. That position appears contrary to the Supreme Court's decision in *Barnhart* and this Court's decision in *Community Health Center*.

statute itself is very complex", the Commission has long and broad "expertise in making such policy decisions," and "the importance of the agency's decisions to the administration of the statute" is critical.

The only reason to consider not according conclusive deference to the Commission's position might be that it is not a "long-standing" one. That, however, is only true in the limited sense that the claim that the indirect acquisitions are within the scope of Section 16(b) is itself an apparently novel claim. The Commission should not have to envision every novel claim that might be made under Section 16(b) and analyze these hypothetical claims, before its views will be deemed authoritative.[13]

In a broader sense, moreover, the analysis here is closely similar to the sort of analysis the Commission has repeatedly engaged in for many years. The Commission has over the decades analyzed which transactions do not present risk within the purposes of Section 16(b).[14] Consistent with its rulemaking authority, the Commission has emphasized in both rules and *amicus* briefs that liability should exist only in situations where there is a real risk of insider trading.[15]

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[13] In *In re New Times Securities Services, Inc.*, 371 F.3d 68, 80-83 (2d Cir. 2004), this Court appeared to recognize that a Commission *amicus* brief might be entitled to Chevron deference, but declined to give it such deference because of the Commission's failure to previously address an issue even though it was longstanding. The Court also noted the presence of a competing view by an entity that administers the provision on a day to day basis, and the relation of the Commission to that entity. None of those facts exist in this case.

[14] *See, e.g., Rules* 16a-9 through 13 and 16b-1 through 16b-8, 17 C.F.R. 240.16a-9 to 16a-13 and 16b-1 to 16b-8.

[15] *See, e.g., Ownership Reports and Trading By Officers, Directors and Principal Securities Holders*, Exchange Act Rel. No. 28869, 56 Fed. Reg. 7242, 7252 (Feb. 21, 1991); *Brief of the Securities and Exchange Commission, Amicus Curiae, in Support of the Appellee on Issues Addressed*, at 23-24; *Levy v. Southbrook International Investments, Ltd*, 263 F.3d 10

The Commission's *amicus* position here satisfies the other requirements for *Chevron* deference. It is the product of careful consideration, and is the authoritative view of the Commission itself, not merely staff views. The Commission's Office of the General Counsel posted to the Commission's Web site a statement regarding consideration of *amicus* briefs. In relevant part, it states that after a request is made:

> The Office of the General Counsel will review the materials submitted and seek input from Divisions and Offices of the Commission that may have an interest in the case. In cases where further review is appropriate, the staff generally will contact both sides and offer them the opportunity to make further submissions in writing, in person, or by telephone. If the staff determines that *amicus* participation is merited in a particular case, the Office of the General Counsel will make a recommendation, together with interested Divisions and Offices, to the Commission. The Commission then considers and votes on whether to accept the recommendation and file a brief. This process can take a significant amount of time.

Request for Commission Amicus Participation in a Pending Case, posted at http://www.sec.gov/litigation/briefs/amicus request.htm. *Amicus* briefs submitted by the Commission thus represent the views of the Commission. *See e.g.*, David S. Ruder, *Address: The Development of Legal Doctrine Through Amicus Participation: The SEC Experience*, 1989 Wis. L. Rev. 1167 (1989). All of these steps were taken in this case.[16]

(2d Cir. 2001); *Brief of the Securities and Exchange Commission, Amicus Curiae* at 13-14, *Gryl v. Shire Pharmaceuticals Group PLC.*, 298 F.3d 136 (2d Cir. 2002).

[16] The Commission's staff had detailed meetings with both sides' counsel, made further inquiries of them and received responses, and prepared a detailed written analysis and recommendation. The Commission reviewed

Even when denying deference to a Commission *amicus* brief on other grounds, this Court has said it had "no reason to doubt that the SEC's interpretation was the product of careful consideration." *In re New Times Securities Services, Inc.*, 371 F.3d at 82.

The statutory interpretation in this brief is an authoritative and fully considered position by the Commission, which reasonably construes an ambiguous statutory provision whose interpretation was explicitly entrusted by Congress to the Commission. We believe that the views expressed in this brief are entitled to Chevron deference.

CONCLUSION

The judgment of the district court should be affirmed and the positions of the Commission urged above should be adopted by the Court.

Respectfully submitted,

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February, 2006

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the recommendation for three weeks, met and discussed it, and then voted to authorize the brief. It also reviewed the brief itself.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 05-0115-cv

AT HOME CORPORATION,
Plaintiff-Appellant,

v.

COX COMMUNICATIONS, INC., COX@HOME, INC.,
COMCAST CORPORATION, COMCAST ONLINE
COMMUNICATIONS, INC., COMCAST PC INVESTMENTS, INC.,
BRIAN L. ROBERTS AND DAVID M. WOODROW,
Defendants-Appellees.

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)

I certify that THE BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, SUBMITTED AT THE REQUEST OF THE COURT complies with the type-volume requirements of Rules 32(a)(7)(B) and 29(d) of the Federal Rules of Appellate Procedure (F.R.A.P.) because it contains 6988 words. I further certify that this brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because it has been prepared in proportionally-spaced typeface using WordPerfect (version 11) in garamond 14-point font size.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 32(a)(1): BRIEFS IN DIGITAL FORMAT

I certify that THE BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, SUBMITTED AT THE REQUEST OF THE COURT, as submitted in digital format, has been scanned for viruses using McAfee VirusScan version 8.0 with signature 4692 of February 8, 2006 and that no viruses have been detected as required by Local Rule 32(a)(1).

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CERTIFICATE OF SERVICE

I, Allan A. Capute, am a member of the bars of Maryland and the District of Columbia, and I hereby certify that on 9th day of February, 2006, I caused to be served two copies of the BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, SUBMITTED AT THE REQUEST OF THE COURT, to counsel for the parties of record at the address below, by overnight Federal Express:

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APPENDIX B

SEC Rule 16b-6(b) (17 C.F.R. § 240.16b–6(b))

The closing of a derivative security position as a result of its exercise or conversion shall be exempt from the operation of section 16(b) of the Act, and the acquisition of underlying securities at a fixed exercise price due to the exercise or conversion of a call equivalent position or the disposition of underlying securities at a fixed exercise price due to the exercise of a put equivalent position shall be exempt from the operation of section 16(b) of the Act: *Provided, however*, That the acquisition of underlying securities from the exercise of an out-of-the-money option, warrant, or right shall not be exempt unless the exercise is necessary to comport with the sequential exercise provisions of the Internal Revenue Code (26 U.S.C. 422A).